MOTION FILED
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-509

EXXON CORPORATION,

Appellant,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF WISCONSIN

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF ASSOCIATED DRY GOODS CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Pursuant to Rule 42 of the Rules of the United States Supreme Court, Associated Dry Goods Corporation (hereinafter referred to as "Associated") respectfully moves for leave to file the accompanying brief in this case as *amicus curiae*. The attorneys for Exxon Corporation and the attorneys for the Wisconsin Department of Revenue have refused to consent to the filing of the accompanying brief *amicus curiae*.

Associated is a Virginia corporation which owns and operates seventeen retail department and specialty store divisions in twenty four states and the District of Columbia and is subject to taxation in all of these jurisdictions. During the last several years, Associated has contested various state administrative determinations of its state income tax liability which have been based on the finding that Associated is a "unitary" business and consequently subject to apportionment taxation.

While Associated has asserted in administrative and judicial proceedings that it is not a unitary business, it has also asserted with mixed success that the mere finding of unitariness does not, as a matter of law, support the application of an apportionment method of taxation. Although this point has been raised by Exxon Corporation in its Jurisdictional Statement to this Court, Associated believes that this issue is one with far-reaching sig-

nificance which should be more thoroughly examined and discussed.

Associated therefore submits that it has a significant interest in the case before the Court as well as experience in matters of state taxation to enable it to present a brief *amicus curiae* that will aid the Court in its deliberation.

Date: January 10, 1980

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF ASSOCIATED DRY GOODS CORPORATION

ARGUMENT

The Determination That an Interstate Business is Unitary Does Not, as a Matter of Law, Support the Application of a State's Apportionment Method of Taxation to That Business Without Further Inquiry.

Associated files this brief *amicus curiae* in support of the appeal of Exxon Corporation and submits that this case provides the Court with the opportunity to clarify certain concepts relating to state taxation of interstate businesses. As stated in Exxon Corporation's Jurisdictional Statement, issues of well-settled tax law and doctrine are not being reopened in this case; nevertheless, Associated respectfully submits that the concept of unitariness which has been developed by this Court in *Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission,* 266 U.S. 271, 45 S.Ct. 82 (1924), *Hans Rees' Sons* v. *North Carolina,* 283 U.S. 123, 51 S.Ct. 385 (1931), *Butler Bros.* v. *McColgan,* 315 U.S. 501, 62 S.Ct. 701 (1942) and *Moorman Manufacturing Co.* v. *Bair,* 437 U.S. 267, 98 S.Ct. 2340 (1978) has not only been inappropriately and, as a consequence, unconstitutionally applied by the

Wisconsin Department of Revenue in the case before the Court but that it has also been inappropriately applied to interstate businesses by many other state taxing authorities.

In general, over the years the concept of unitariness, as construed by these state taxing authorities, has become a convenient, simplistic formula which has been indiscriminately applied to interstate businesses without regard to the actual activities of these businesses within the taxing state. As a result many interstate businesses are unconstitutionally taxed in one state for income attributable to the taxpayer's activities in another state.

It cannot be posited that the intent of this Court or the rule of law involving the unitary concept would permit state taxing authorities, as a matter of mere rote and with total disregard of the facts, to indentify some indices of unitariness on the part of an interstate business and conclude that the business is unitary and therefore subject to taxation on an apportionment basis.

In fact, Associated suggests that a careful study of the facts which relate to this issue would reveal that state taxing authorities utilize the apportionment method primarily because of its convenience and simplicity, without regard to equity or fairness or constitutional questions, because the apportionment basis provides an easy and shorthand way in which state taxing authorities can assess tax. In other words, the state authorities can, with minimum effort, utilize the federal income tax returns and apply apportionment formulas thereto without regard to underlying functional and taxing considerations. Furthermore, in situations where businesses file returns on a separate accounting basis, this approach has enabled state taxing authorities to compute the amount of tax liability under both the apportionment and separate accounting method and then arbitrarily assess the tax based upon whichever method provides them with the greatest amount of revenue.

This arbitrary and bureaucratic method of application of apportionment formulas by state taxing authorities requires a

remedy by this Court. In rejecting the Wisconsin Department of Revenue's "unitary *per se*" approach to state taxation, the Court has an opportunity and a duty to clarify that the determination alone that a business is "unitary", without further inquiry, does not justify the application of apportionment taxation.

Indeed, determinations by state taxing authorities as to whether an interstate business is unitary for tax purposes almost seem to ignore the fact that the ultimate issue is one of taxation. Many indices of unitariness cited by state taxing authorities are totally irrelevant to tax issues. For example, in determining whether a business is unitary state taxing authorities have relied on such indices as the fact that the president of the business has the ultimate right to hire and fire personnel, that the business has a common pension plan, that officers of the divisions hold annual meetings to discuss common problems, that the divisions send regular reports to the corporate home office, and that the officers of the various divisions are also officers of the corporate entity.

However, the determination of the income tax liability of a business must relate to income and income in turn is a function of revenue and expense; consequently, the determination of the income tax liability of a multistate business must go beyond simply identifying organizational unitary characteristics and must be directed to determining the taxpayer's sources of revenues and expenses. Where the preponderance of relevant indices are not treated by the corporation on a unitary basis and where it can be shown by clear accounting systems and routine bookkeeping entries that revenue and expense arise solely within a state, the income derived therefrom is taxable. Where it can be shown that revenue and expense arise outside a state, the income derived therefrom cannot be taxable by that state and in such circumstances, separate accounting for tax purposes must be employed. On the other hand, where there is a national or interstate unity of accounts, then unitary characteristics for tax purposes are significant and the application of an apportionment method of taxation is appropriate.

Such inquiry into the nature and quality of revenue and expense is quite commonly undertaken in the regulatory domain among regulated industries and there is no reason why state taxing authorities should not be equally as sophisticated in their inquiry.

This is not to say that the inquiry concerning unitariness does not have its place, but as the Jurisdictional Statement of Exxon so aptly points out, a finding of unitariness merely presents a condition precedent to apply an apportionment method; it does not provide the conclusion or the result of the taxation inquiry. If it does, then economic realities may be ignored and the constitutional protections against a state extending its taxing power beyond its borders are relegated to a fairyland unrelated to real facts.

Consequently, Associated supports Exxon Corporation's position that this Court should reject the Wisconsin Department of Revenue's "unitary *per se*" approach to state taxation. Furthermore, Associated respectfully submits that the Court should take this opportunity to clarify the appropriate use of the unitary concept in determining whether an apportionment method of taxation may be applied to an interstate business. In this regard, it is submitted that this Court should provide language which would clearly specify that in determining the appropriateness of applying an apportionment method of taxation, state taxing authorities should go beyond the determination that a business is unitary and should inquire as to the economic realities of the taxpayer and as to tax considerations relating to the appropriate situs determination of revenue and expense.

This can be done by indicating that the unitary concept is not intended to be a simplistic formula or rubric but only one of the tools that may be used to determine the state tax liability of an interstate business. Other forms of evidence may always be adduced to determine the most appropriate and equitable method of state taxation.

Conclusion

For the reasons stated above, the Court should reject the Wisconsin Department of Revenue's unitary *per se* approach to determining the tax liability of an interstate business.

Respectfully submitted,

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